No. 2177.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF.

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PRESS OF THE JAMES H BARRY CO

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ARGUMENT.

The rule of law announced in United States vs. Fitzpatrick, has not been changed, giving to Section I, part 2 of the Alaska Code of Criminal Procedure its widest meaning. No effort was made in the brief of the United States Attorney to answer the proposition discussed on pages 34 and 35 of the brief of plaintiff in error.

At the argument of this case before the Circuit Court of Appeals, the proposition was plainly put in the opening statement of the plaintiff in error, and no

attempt was made on the part of the United States Attorney to answer the contention. Briefly to repeat the proposition it is this:

Under the authority of the *United States against Fitzpatrick,* 178 U. S., 304, all indictments, whether for violations of law described in the Revised Statutes, or for violation of local laws, must be tested by the Oregon law in effect on May 17th, 1884, so that when the Criminal Code of March 3rd, 1899, was passed, and Section I, which reads as follows, was adopted:

> "That proceedings for the punishment and prevention of crimes as defined in Title I of this Act, shall be conducted in the manner herein provided."

Still the rule in the Fitzpatrick case was left in effect with reference to the prosecution of crimes not defined in Title I. Fitzpatrick was prosecuted for an offense defined in the Revised Statutes of the United States, and not for an offense defined by the laws of Oregon.

Section I, Part 2, does not provide any other different or new method for the prosecution of crimes not defined in Title I, and no section of the Alaska statutes can be pointed to creating a dual system of procedure, or changing the old law as announced in the Fitzpatrick case.

Section 43 of the Alaska Criminal Code was in effect in Oregon in 1884, and it makes no difference whether the plaintiff in error in this case is protected

by the old Oregon law, or is protected by the new Code of Criminal Procedure.

It seems to us that this point is decisive of the whole case, and every attempt was made to force it upon the attention of the government by the discussion in the briefs, and by the opening oral argument. Yet no attempt has been made to reply to the proposition above stated.

VIOLATION OF SECTION 5209 OF THE REVISED STATUTES RELATING TO NATIONAL BANKS IS NOW A FELONY.

At page 98 of the brief of defendant in error, we find the contention that the violation of Section 5209 is a misdemeanor. It is true that the acts denounced by this section were originally declared to be misdemeanors, but the new Criminal Code, Section 335, Supplement Compiled Statutes, page 1687, reads as follows:

> "All offenses which may be punished by death or imprisonment, or for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

The specific point in question was decided by the Circuit Court of Appeals for the First Circuit in the case of *Kelleher* vs. *United States,* 193 Fed., 8. At page 11, the Court uses the following language:

> "The indictment takes up only ten of these fifty transactions, having only ten counts, giving the first

as of December 6th, 1909, making the second transaction December 9th, and running through to include December 31st. There were some transactions after December 31st, that is in January, 1910, which were not relied upon in this proceeding because if they had been prosecuted, they would have been justifiable under the Penal Code (Act March 4, 1909, page 321, 35 Stats. at Large, 1088, U. S. Comp. St. Supp. 1909, page 1391). All became effective as of January 1st, 1910, which rendered these offenses, after it became effective, felonies, while under the revised statute before the Penal Code became effective, they were misdemeanors. Of course the two classes could not be joined in the same indictment."

The prosecution in the Kelleher case was under Section 5209 of the Revised Statutes, and the specific point passed on contrary to the contention made by the defendant in error in this case.

SECTION 1024 AND THE OTHER GENERAL PROVISIONS WITH REFERENCE TO PROCEDURE FOUND IN THE REVISED STATUTES, REFER ONLY TO THE PROCEDURE IN UNITED STATES DISTRICT OR CIRCUIT COURTS AND HAVE NO APPLICATION WHATEVER TO THE PROCEDURE IN THE TERRITORIAL COURTS.

Counsel for the defendant in error, contends in his brief that any statute of the United States, whether of procedure or substance, applies to Alaska, and in this respect counsel seems to entirely misconceive the

course of judicial decision with reference to the application of the statutes relating to procedure.

Shortly after the adoption of the Constitution, an Act was passed by Congress known as the "Judiciary Act," which related entirely and exclusively to procedure in the United States District and Circuit Courts. From time to time this act was amended, modified and added to, and the Judiciary Act as so amended, modified and added to, is found in the Revised Statutes of the United States under the title "Judiciary." It is under this title that we find Section 1024.

These acts relating to procedure apply only to United States District or Circuit Courts, and the extension of the laws of the United States to the District of Alaska, Section 1891, and the Act of May 17th, 1884, did not extend the provision with reference to procedure to the Territorial Courts. If counsel's contention is correct, then the Act relating to procedure in the Court of Claims is a statute of the United States, and might as well be held to have become a part of the procedure to the District of Alaska.

The course of judicial decision with respect to the application of the statutes of these territories, is perfectly clear and plain.

In the case of *Corbus* vs. *Leonhardt,* this Court held that Section 858 of the Revised Statutes, which is found under the title of Judiciary, had no application to practice in the territorial courts because it was

originally intended to apply only to practice in United States District and Circuit Courts.

See *Corbus* vs. *Leonhardt,* 114 Fed., 10.

In the case of *United States* vs. *Hall,* 147 Fed., 32, it was held that Section 1033 of the Revised Statutes of the United States had no application to procedure in the territorial courts, because it was originally intended as a statute relating to procedure in United States District and Circuit Courts.

Section 1033 is found under the same title and subdivision as Section 1024. See *United States* vs. *Ball,* 147 Fed., 32.

Likewise, the Supreme Court of the United States in the case of *Thied* vs. *Utah,* 159 U. S., page 510, held that Section 1033 does not control the practice and procedure in territorial courts.

In the case of *Goode* vs. *Martin,* 95 U. S., page 90, it was held that the provisions of the revised statutes relating to the exclusion of witnesses, have no application to practice in the territorial courts, and the language used in the case of *Goode* vs. *Martin* is quoted with approval by this Court in the cast of *Corbus* vs. *Leonhardt.*

In the case of *Clinton* vs. *Englebright,* 80 U. S., 434, the Court uses the following language:

> *"If this opinion needed additional confirmation, it would be found in the Judiciary Act of 1789. The regulations of that Act in regard to the selec-*

tion of jurors, had no reference whatever to the territory. They were framed with reference to States and cannot without violence to the rules of construction, be made to apply to territories of the United States. If then this subject were not regulated by territorial law, it would be difficult to say that the selection of jurors had been provided for at all in the territories."

The intention of Congress to have its law of procedure apply to territorial courts only where the territorial courts are specifically mentioned, is quite evident from the Act of July 22nd, 1813, referring to civil causes, which is as follows:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That whenever there shall be several actions or processes against persons who might legally be joined in one action or process, touching any demand or matter in dispute before a court of the United States OR OF THE TERRITORIES THEREOF, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action or process, unless special cause for several actions or processes shall be satisfactorily shown on motion in open court.

Sec. 2. BE IT FURTHER ENACTED, That whenever proceedings shall be had on several libels against any vessel and cargo which might legally be joined in one

libel before a court of the United States OR OF THE TERRITORIES THEREOF, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo severally shall be satisfactorily shown as aforesaid. And in proceedings on several libels or informations against any cargo or parts of cargo or merchandise seized as forfeited for the same cause, there shall not be allowed by the court more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned: but allowance may be made on one libel or information for the costs incidental to several claims: PROVIDED, That in case of a claim of any vessel or other property seized on behalf of the United States and libelled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favor of the claimant, he shall be entitled to the same upon paying only his own costs.

Sec. 3. AND BE IT FURTHER ENACTED, That whenever causes of like nature, or relative to the same question shall be pending before a court of the United States OR OF THE TERRITORIES THEREOF, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable.

And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States OR OF THE TERRITORIES THEREOF, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

Approved, July, 22, 1813.

The Act just quoted is found in the Revised Statutes of the United States, Sections 921, 977, 978 and 982. It is evident that only those sections of the Revised Statutes relating to procedure which specifically mention the courts in the territories, have application to those courts. These Sections are discussed by the defendant in error at pages 40 to 43 of the brief.

A reading of the Act shows that as early as 1813, Congress deemed it necessary to specifically mention the territories whereof it was intended that the Act of procedure should apply thereto. We find this remarkable statement with reference to *Fitzpatrick* vs. *United States:*

> "What has been said in most of the previous cases, may be said of the case of *Fitzpatrick* vs. *United States,* quoted by counsel. This too, was a prosecution under a local territorial statute, and the offense involved was in no sense a Federal crime."

Fitzpatrick was prosecuted for a violation of Sec-

tion 5339 of the Revised Statutes of the United States, and not under the local territorial statute, or under the law of Oregon. The decision in that case shows plainly the distinction as to what statutes of the United States are applicable to the District of Alaska. The procedure of Oregon is applied, but the defendant in the case was prosecuted for a violation of the general laws of the United States, to-wit, Section 5339.

See *Fitzpatrick* vs. *United States,* 178 Fed., page 304.

The application of the local procedure to prosecutions under general laws of the United States is fully and specifically dealt with in the opinion of Mr. Justice Vandevanter in the case of *Cochran* vs. *United States,* 147 Fed., 206, and no amount of argument or explanation can qualify or limit the express meaning and scope of that decision. The language is unequivocable.

Counsel relies all through the brief principally upon the case of *Page* vs. *Bernstein,* 102 U. S., page 664, and we are surprised at the attempt to use this case in view of the language used by this Court in the case of *Corbus* vs. *Leonhardt,* 114 Fed., page 12, which is as follows:

Page vs. *Bernstein,* cited by the plaintiff in error, is not in opposition to these views. That decision was rendered under certain provisions of the Act provid-

ing a government for the district of Columbia, which are not applicable to Alaska, and in the course of the opinion, the Court said:

> "These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the general statutes of the United States relating to practice and proceedings in courts of the United States are locally inapplicable to territorial courts."

Great reliance is placed by the defendant in error upon the decision of Mr. Justice Zane in the case of *United States* vs. *Jones,* 18 Pac., 233. It is sufficient to say that this opinion was dissenting opinion and that the rule announced in the case of *United States* vs. *Jones* was exactly contrary to the rule contended for by the defendant in error in this case.

Great reliance is also placed upon the opinion of the Supreme Court of New Mexico in the case of *United States* vs. *Folsom,* 38 Pac., 70. An examination of the laws of New Mexico would show that there is no provision prohibiting the joinder of counts in an indictment such as is contained in the Alaska Code, and in the laws of Oregon. An examination of the opinion will further show that the leading cases on the question of practice in the territorial court, are not cited or discussed. There is no dispute in this case about the application of the statute of limitations, for the Alaska Code expressly adopts the

Federal Statute of Limitations, and that statute is so worded that it would apply to the prosecution of the crimes denounced by the Revised Statutes, no matter in what court the prosecution was instituted.

We are surprised at the attempt of the defendant in error to use the case of *Nagle* vs. *United States,* 191 Fed., 141, as an authority in favor of the defendant in error in this suit. In that case it was contended unsuccessfully by counsel for the government (the same counsel appears for the defendant in error in this case) that Alaska was an exception to the general rule, and that the statutes and decision referring to territories of the United States had no application to the District of Alaska; in other words, the District of Alaska stood in a peculiar position.

An examination of the government's brief in that case would show that strenuous efforts were made to prevent the application of the general laws and principles announced with reference to the territory of Alaska. In this effort, counsel for the government failed. Judge Wolverton in a very exhaustive opinion, 191 Fed., page 145, disposes of this question as follows (referring to the Act of May 17th, 1884): "This act was superseded by the Act of June 8th, 1900, (31 Stat. 321) which provided for a complete political, criminal and Civil Code for the government of Alaska, omitting all restrictions as contained in Section 14 of the old Act. Could any more adequate and complete organization of the territory of Alaska

be had? True, no legislative body is provided for, but Congress constitutes that body, if such a one is requisite to give Alaska the status of an organized territory."

It is interesting to note that since the disposition of this case in the lower court, Congress has provided a legislative assembly for the District of Alaska. The act was passed in the month of August this year, and we are unable to give the citation as the volume of the Statutes at Large containing the Act, has not yet been published. The entire course of judicial procedure in the last few years has been to put Alaska on exactly the same footing with any of the other territories.

See

Nagles vs. *United States,* 191 Fed., 141;
Rasmussen vs. *United States,* 197 U. S., 516;
Binns vs. *United States,* 194 United States, 486,

and the recent decision in the case of the *Interstate Commerce Commission* vs. *United States* found in the Advance Sheets of the Supreme Court Reporter for the last term.

It was admitted by the Judge in rendering the opinion in this case in the lower court, that if Alaska is not an exception to the general rule with reference to territories, Section 1024 could not apply, and Section 43 of the Alaska Code would control. In this connection, the Court uses the following language:

> "It must therefore be conceded to be the settled law that any territory where a legislature has been provided for by Act of Congress, such legislature has the power to provide for the procedure, to govern the trial of all causes without reference to whether or not the same are being conducted under the local law of the territory, or under the general laws of the United States."

We have then under the authority of *Nagle* vs. United States, a decision that Alaska is a full-fledged territory. She now has a legislature, and if the defendant in error prevails in its contention in this case, we will have a decision to the effect that Alaska is not like the other territories and that the cases applicable to the other territories do not apply to Alaska.

THE DOCTRINE OF FEDERAL NECESSITY.

All through the brief of the defendant in error we find the following remarkable doctrine appealed to:

> "The application of local procedure to federal crimes would lead to conflict of authority, and would result in crippling the *Federal sovereign.*"

We understand the brief of the United States Attorney correctly. He takes the position before this court of urging that Section 1024 be declared applicable to the prosecution in the case at bar, because it would strengthen the government. In other words, the United States considers it a great calamity that Section 1024 should not apply to the District of Alaska.

At the end of the brief we find the following:

> "Since this question was seriously raised the United States Attorney's office at Juneau has had to be excused from prosecuting two cases under the white slave traffic act, because success seemed impossible without joining two or more counts in the same indictment, and the cases had to be brought in Washington as a consequence."

We take this as a clear admission on the part of the United States Attorney that in spite of the ruling of the lower court in this case, the United States has become convinced that their position of Section 1024 as applied to Alaska is untenable and therefore that they have ceased to prosecute by joining counts in the indictment.

Since the organization of Alaska as a territory in 1884, up to the present date, there is no precedent to sustain the procedure of the United States in this case, except the Idleman case cited at page 101 of the brief of defendant in error, and the question involved in that case was never brought to an Appellate Court because Idleman was acquitted. It is to be noticed also that the District Attorney, who indicted Idleman, started out upon the assumption that Section 1024 did not apply to Alaska, for he was indicted separately for a number of different offenses of the same class, and subsequently the indictments were consolidated.

The very citation of the Idleman case, and the fact

that no other precedent can be found, certainly develops the weakness of the government's position in looking for a precedent over a period of some twenty-six years.

An examination of the opinion of the lower court shows that the Court was in considerable doubt and perplexed as to the application of Section 1024 to procedure in Alaska. That the lower court was prepared to have this question brought to this court and disposed of before the trial of Mr. Summers, is apparent from the language quoted at page 128 of the brief of defendant in error. The right to have the indictment state only one offense is a substantial right of which the defendant cannot be deprived. To argue the question would be to argue a self evident truth.

Pages 92 and 97 of defendant's brief, contain language that is undignified and abusive and the charge is made that the Court has been misled. The language of the opinion of the lower court, brief of defendant in error, pages 122 to 128, shows exactly what was in the mind of the lower court in passing sentence on the defendant without trial. The lower court understood fully the state of the record. The defendant had signed a written election to stand upon Section 97 of the Alaska Code of Criminal Procedure and refused to plead. The Court held that Section 97 had no application to a prosecution of this character, but in order to have the vital question involved in the case passed on by this court as soon as possible, sentenced

the defendant and made up a record which would bring the questions involved in this case, to the attention of the Appellate Court as soon as possible. We do not feel that this Court would be enlightened by a further discussion of the doctrine of public necessity, or by the use of abusive language, such as is found in the brief of the United States Attorney.

The record in this case consists of an indictment, demurrer and sentence, and presents a question of statutory construction, utterly devoid of any passion or feeling. The case has been brought to this court expeditiously, so that the government will not have an opportunity to claim that the defendant is seeking delay. (The statute of limitations will not expire for two years.)

We believe that the United States Attorney has led the lower court into serious error, and is attempting to keep the District of Alaska from having the benefit of the general principles of law applicable to the territories. The temper and tone of the brief shows that the United States Attorney fully realizes that he is wrong in his contention herein, and the language used at the latter end of the brief with reference to the abandonment of Section 1024 in the District of Alaska, in the prosecution of white slave cases, shows that either the United States Attorney or the Department of Justice itself, has decided that Section 1024 has no application to the territorial courts.

The discussion of the history of Section 1024 in

counsel's brief, is evasive. It is clear that the Act of Congress first containing Section 1024 had no application except in United States District and Circuit Courts, that subsequent legislation of Congress has never applied that Act to the territories, except with reference to *schedule of fees to be charged.* It must be remembered also in so far as the fees are concerned, that Section 1024 had no application to Alaska, because the United States Attorney there was never compensated in Alaska except by salary.

Respectfully submitted.

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